

FEDERAL CIRCUIT COURT OF AUSTRALIA

*UDDIN & ORS v MINISTER FOR
IMMIGRATION & ANOR*

[2015] FCCA 847

Catchwords:

MIGRATION – Migration Review Tribunal – Class BW (employer nomination) visa – bogus document – purposeful falsity – no jurisdictional error.

Legislation:

Federal Circuit Court Act 1999, s.17A
Federal Circuit Court Rules 2001, r.13.10
Migration Act 1958, s.476
Migration Regulations 1994 cl.602.203

Cases cited:

Trivedi v Minister for Immigration and Border Protection [2014] FCAFC 42

First Applicant:	MUNSHI JASHIM UDDIN
Second Applicant:	SHARMIN MAHBUBA
Third Applicant:	SANJIDA SULTANA
First Respondent:	MINISTER FOR IMMIGRATION & BORDER PROTECTION
Second Respondent:	MIGRATION REVIEW TRIBUNAL
File Number:	SYG 1543 of 2014
Judgment of:	Judge Street
Hearing date:	31 March 2015
Date of Last Submission:	31 March 2015
Delivered at:	Sydney

Delivered on: 31 March 2015

REPRESENTATION

Solicitors for the Applicants: Mr M. Jones
Parish Patience Immigration Lawyers

Solicitors for the Respondent: Ms S. Given
Sparke Helmore

ORDERS

- (1) The Application be dismissed.
- (2) First Applicant and Second Applicant pay the First Respondent's costs fixed in the sum of \$5800.
- (3)
 - (i)

**FEDERAL CIRCUIT COURT
OF AUSTRALIA**

AT SYDNEY

SYG 1543 of 2014

MUNSHI JASHIM UDDIN

First Applicant

SHARMIN MAHBUBA

Second Applicant

SANJIDA SULTANA

Third Applicant

And

MINISTER FOR IMMIGRATION & BORDER PROTECTION

First Respondent

MIGRATION REVIEW TRIBUNAL

Second Respondent

REASONS FOR JUDGMENT

1. This is an application within the Court's jurisdiction under s.476 of the *Migration Act 1958* for a constitutional writ in respect of a decision of the Tribunal made on 12 May 2014 affirming a decision of the delegate not to grant the applicants Employer Nomination (Residence) (Class BW) Visas. The amended application identifies the following grounds:

The Tribunal misdirected itself as to the correct interpretation of Public Interest Criterion 4020 in Schedule 4 to the Migration Regulations 1994.

Particulars

The Tribunal failed to consider whether the document which it found to be bogus had the necessary quality of purposeful falsity to come within the scope of PIC 4020.

2. Section 97 of the *Migration Act* provides as follows:

Section 97 - Interpretation

In this Subdivision:

[...]

"bogus document " , in relation to a person, means a document that the Minister reasonably suspects is a document that:

(a) purports to have been, but was not, issued in respect of the person; or

(b) is counterfeit or has been altered by a person who does not have authority to do so; or

(c) was obtained because of a false or misleading statement, whether or not made knowingly.

3. Section 4020 of Public Interest Criterion provides as follows:

4020 (1) There is no evidence before the Minister that the applicant has given, or caused to be given, to the Minister, an officer, the Migration Review Tribunal, a relevant assessing authority or a Medical Officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to:

(a) the application for the visa; or

(b) a visa that the applicant held in the period of 12 months before the application was made.

(2) The Minister is satisfied that during the period:

(a) starting 3 years before the application was made; and

(b) ending when the Minister makes a decision to grant or refuse to grant the visa;

the applicant and each member of the family unit of the applicant has not been refused a visa because of a failure to satisfy the criteria in subclause (1).

(2AA) However, subclause (2) does not apply to the applicant if, at the time the application for the refused visa was made, the applicant was under 18.

(2A) The applicant satisfies the Minister as to the applicant's identity.

(2B) The Minister is satisfied that during the period:

(a) starting 10 years before the application was made; and

(b) ending when the Minister makes a decision to grant or refuse to grant the visa;

neither the applicant, nor any member of the family unit of the applicant, has been refused a visa because of a failure to satisfy the criteria in subclause (2A).

(2BA) However, subclause (2B) does not apply to the applicant if, at the time the application for the refused visa was made, the applicant was under 18.

(3) To avoid doubt, subclauses (1) and (2) apply whether or not the Minister became aware of the bogus document or information that is false or misleading in a material particular because of information given by the applicant.

(4) The Minister may waive the requirements of any or all of paragraphs (1)(a) or (b) and subclause (2) if satisfied that:

(a) compelling circumstances that affect the interests of Australia; or

(b) compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen;

justify the granting of the visa.

(5) In this clause:

"information that is false or misleading in a material particular" means information that is:

(a) false or misleading at the time it is given; and

(b) relevant to any of the criteria the Minister may consider when making a decision on an application, whether or not the decision is made because of that information.

4. Mr Jones's principal contention is that there was no purposeful proved finding made by the Tribunal in respect of the bogus document. Mr Jones accepts because of the broad definition of bogus document in s.97 that the reference that was propounded by the applicant and which bore a signature by a person other than the restaurant manager fell within the broad concept of a document that the Minister reasonably suspects within the meaning of s.97.
5. It is clear from the decision in *Trivedi v Minister for Immigration and Border Protection* [2014] FCAFC 42 that the construction of PIC 4020 which has been adopted by the Court requires an element of fraud or deception by someone and not necessarily the applicant. In this case I agree with Mr Jones that the finding in para.35 by the Tribunal means the Tribunal did not find that the applicant engaged in a fraud or deception or that the applicant purposely advanced an untrue document, being the bogus document.
6. The difficulty the applicant faces is that the purpose of the terms of PIC 4020 was to address the problem of attempts to work a fraud or deception on the assessment of claims for a visa. The Full Court in *Trivedi v Minister for Immigration and Border Protection* said at [43]:

43. In my view, it is not necessary (for reasons yet to be further developed) to show knowing complicity by a visa applicant. That would impose an impossible task on those administering the visa system. But it is necessary that the information or document have the necessary quality of purposeful falsity, whether or not the visa applicant can be shown to have knowledge of that fact.
7. In this case it was not necessary for the Tribunal to determine whether the applicant was aware that he was providing a bogus document, and there is no error in para.35. Moreover, it appears clear from paras.32 and 33 that the Tribunal has made a finding of fact that someone, not in this case the applicant, has purposely created an untrue reference which was not signed by the person by whom it purported to be signed. It was found to be signed by someone claiming to be the restaurant manager.

8. The Tribunal squarely found:

32. The Tribunal finds that the work reference was not written by Mr Howlader and was not issued by him. The Tribunal finds that the signature on the work reference does not match the signature of Mr Howlader, the purported author.

9. It was in those circumstances that the Tribunal then turned to make a finding in para.33:

33. The Tribunal finds that the document has been made to imitate and pass for a reference written by Mr Howlader and it is not genuine. The Tribunal therefore finds that the reference is a bogus document because, pursuant to s.97(b) of the Act, the document is counterfeit.

10. In my opinion, that is a clear finding of purposeful falsity within the principles identified in *Trivedi v Minister for Immigration and Border Protection* [2014] FCAFC 42.

11. In my opinion, it was open to the Tribunal, on the material before the Tribunal, to make that finding of purposeful falsity. It cannot be said that the finding lacks an evident and intelligible justification. It is in these circumstances there is, in my opinion, no jurisdictional error of the kind advanced in the amended application.

12. It is not necessary for the Tribunal to use language “purposeful falsity”. It is sufficient to read the Tribunal’s decision as a whole and the finding that it was not genuine and that it was made to imitate and pass for a reference written by someone else, are findings that amount to purposeful falsity.

13. Accordingly, I am satisfied there is no jurisdictional error and that in these circumstances, the application is dismissed.

I certify that the preceding thirteen (13) paragraphs are a true copy of the reasons for judgment of Judge Street

Associate:

Date: 9 April 2015